

THE EVOLUTION OF DOJ AND SEC EXPECTATIONS FOR
CORPORATE COMPLIANCE PROGRAMS AND STAYING AHEAD
OF THE CURVE

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I. FINANCIAL SCANDALS OF THE 2000S AND THE DOJ AND SEC RESPONSE

FOR companies hoping to receive credit from the U.S. Department of Justice (DOJ) in the event of wrongdoing, an effective compliance program is essential. For many years, the sole guidance provided by the DOJ were generic mandates contained in the U.S. Sentencing Guidelines. That changed in the early 2000s when public accounting scandals at Enron¹ and WorldCom² came to light, both of which involved the companies overstating their earnings by billions of dollars. Through both scandals, the DOJ, the U.S. Securities Exchange Commission (SEC), and the public learned the extent to which company officials were involved in the fraudulent activity. The immediate response of the DOJ and SEC was to include imposition of compliance monitors in many resolutions.³ Additionally, the DOJ and SEC began to shift course on compliance programs and

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1. See Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Jeffrey K. Skillington, Enron's Former President, Chief Executive Officer and Chief Operating Officer, with Fraud (Feb. 19, 2004) (on file with author). The SEC ultimately charged several former Enron executives with violating the books and records, internal controls, and anti-fraud provisions of securities laws in relation to a scheme to falsify Enron's financials by manufacturing earnings and engaging in sham transactions, among other things. See *id.*

2. See Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Amended Complaint Against WorldCom To Add Additional Fraud Charge and Two Other New Charges, and Expand the Scope of the Alleged Fraud (Nov. 1, 2002) (on file with author); WorldCom was alleged to have overstated its income on financial statements by \$9 billion through a scheme to defraud investors. *Id.* The SEC received a \$2.25 billion judgment against WorldCom, though the payment received was lower due to WorldCom's bankruptcy. See Press Release, U.S. Sec. & Exch. Comm'n, The Honorable Jed Rakoff Approves Settlement of SEC'S Claim for a Civil Penalty Against Worldcom (July 7, 2003) (on file with author).

3. See, e.g., RICHARD C. BREEDEN, REPORT TO THE HONORABLE JED S. RAKOFF, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ON CORPORATE GOVERNANCE FOR THE FUTURE OF MCI (2003), <https://www.sec.gov/spotlight/worldcom/wcomreport0803.pdf> [<https://perma.cc/BSV3-VZJP>] (WorldCom corporate monitor report).

make known certain minimum expectations. To discourage similar scandals from occurring, the SEC and DOJ began focusing on requiring internal controls and whistleblower reporting to promote compliance. Companies responded in kind by implementing elaborate internal controls and corresponding certification regimes and standing up anonymous hotlines to accommodate this new “stick” approach propounded by federal regulators.

As it turned out, this “stick” approach pushed by federal regulators did not result in the ethical behaviors they hoped for. New scandals emerged in the wake of the 2008 financial crisis highlighted by the meltdown of the banking sector and the crisis in the mortgage lending and related securities markets. Following the 2008 crisis as well as after several significant settlements for violations of the Foreign Corrupt Practices Act (“FCPA”),⁴ the DOJ and SEC shifted course once again. Instead of focusing on reporting, the DOJ began issuing guidance on what it believed were the elements of an effective compliance program. The DOJ has refined its criteria for effective compliance programs over the past ten years, each time with an increasing focus on defining what it believes are the minimum components of a corporate compliance program.

II. THE DOJ’S CURRENT GUIDANCE FOR CORPORATE COMPLIANCE PROGRAMS

A. *Justice Manual*

The Justice Manual provides a starting point for assessing effective corporate compliance programs, as it serves as a guide for federal prosecutors when investigating and prosecuting companies. In deciding whether to bring charges against a company, prosecutors “should” consider several factors known as Filip factors, including “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and “the corporation’s remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an ex-

4. See e.g., Press Release, U.S. Dep’t of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations (May 14, 2008) (on file with author) (detailing corrupt payments by Willbros Group Inc. and its subsidiary to government officials in Nigeria and Ecuador, resulting in a \$22 million criminal penalty and filing of a deferred prosecution agreement); Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008) (on file with author) (detailing guilty plea by Siemens AG and three international subsidiaries for violations of the internal controls and books and records provisions of the FCPA following years of payments for unknown purposes to business consultants and for corrupt payments to foreign officials).

isting one[.]”⁵ While having a compliance program is essential under the Filip factor assessment, the Justice Manual cautions that “the existence of a compliance program is not sufficient[.]”⁶ Instead, compliance programs must be “adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees” and corporate management must “enforce[e] the program . . . [instead of] tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.”⁷ Prosecutors are discouraged from assessing compliance programs using a “formulaic” approach; rather, the Justice Manual highlights the importance of considering the strength of a compliance program, including measures that are in place to identify and prevent bad behavior, on their own merits.⁸

B. Sentencing Guidelines

Like the Justice Manual, the U.S. Sentencing Guidelines (USSG) emphasize the importance of an effective compliance program when prosecutors recommend sentences and judges impose sentences against companies for violations of the law. To receive credit in the sentencing process, a company must “(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”⁹ To do so, companies are required to establish procedures to detect misconduct, ensure that management is knowledgeable about and responsible for the effective operation of the compliance program, and monitor and educate employees.¹⁰ Companies must “evaluate periodically the effectiveness of the organization’s compliance and ethics program” and make modifications to prevent misconduct based on prior bad acts.¹¹

C. FCPA Guide

In 2012, the SEC and the DOJ released *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (“Resource Guide”) providing, for the first time, guidance on the elements of a compliance program. While the Resource Guide focused on the FCPA, its guidance was also applicable to corporate compliance programs. The Resource Guide cautioned that “[c]ompliance programs that employ a ‘check-the-box’ approach may be

5. *Justice Manual § 9-28.300—Factors to Be Considered*, U.S. DEP’T OF JUST., <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> [<https://perma.cc/7P48-6GWZ>] (last updated July 2020).

6. *Id.* § 9-28.800—*Corporate Compliance Programs* (last modified July 2019).

7. *Id.*

8. *See id.*

9. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (U.S. SENTENCING COMM’N 2013).

10. *See generally id.* § 8B2.1(b).

11. *Id.* § 8B2.1(b)(5)(B); *see also id.* § 8B2.1(b)(7).

inefficient and, more importantly, ineffective.”¹² The Resource Guide cites (1) “Commitment from Senior Management and a Clearly Articulated Policy Against Corruption;” (2) “Code of Conduct and Compliance Policies and Procedures;” (3) “Oversight, Autonomy, and Resources;” (4) “Risk Assessment;” (5) “Training and Continuing Advice;” (6) “Incentives and Disciplinary Measures;” (7) “Third-Party Due Diligence and Payments;” (8) “Confidential Reporting and Internal Investigation;” (9) “Continuous Improvement;” and (10) “Pre-Acquisition Due Diligence and Post-Acquisition Integration” for mergers and acquisitions.¹³ The Resource Guide was updated in 2020 to expand the requirements of an effective compliance program, including asking whether a compliance program is “adequately resourced and empowered to function effectively” and whether companies apply “lessons learned” from reported violations and investigations.¹⁴

D. *Evaluation of Corporate Compliance Program Guidelines*

The culmination of the Justice Manual and the USSG is seen in the DOJ’s Evaluation of Corporate Compliance Programs guidelines (“Guidelines”).¹⁵ The Guidelines, which are meant to assist prosecutors in determining the outcome of a corporate offense by looking at the company’s compliance program at the time that the offense occurred, were updated in 2020.¹⁶

In evaluating corporate compliance programs, the Guidelines instruct prosecutors to focus on three questions: (1) “Is the corporation’s compliance program well designed?;” (2) “Is the program being applied earnestly and in good faith” such that it is “adequately resourced and empowered to function effectively?;” and (3) “Does the corporation’s compliance program work in practice?”¹⁷ Picking up on the Justice Manual rejection of a “one-size-fits-all” approach, the 2020 revisions to the Guidelines explicitly state that “the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs” and instead “make[s] a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company’s size, industry, geographic footprint, regulatory landscape, and other fac-

12. See U.S. DEP’T OF JUSTICE, CRIM. DIV. & U.S. SEC. & EXCH. COMM’N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 57 (2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [<https://perma.cc/XYU8-KP3Y>].

13. *Id.* at 57–62.

14. *Id.* at 57, 67.

15. See generally U.S. DEP’T OF JUST., CRIM. DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [<https://perma.cc/Z6MV-CL8C>].

16. See *id.*

17. *Id.* at 2 (internal quotation marks omitted).

tors, both internal and external to the company's operations, that might impact its compliance program."¹⁸

In assessing whether a compliance program is well-designed, the Guidelines instruct a prosecutor to first look at "why the company has chosen to set up the compliance program the way that it has, and why and how the company's compliance program has evolved over time."¹⁹ The Guidelines make clear that the answer to these questions is not formulaic and that companies must be adaptive to their particular circumstances if they want to receive credit for their compliance programs. Assessing risk when establishing a compliance program is not enough. Instead, prosecutors consider "revisions to corporate compliance programs in light of lessons learned" as a form of "risk-tailoring."²⁰ Similarly, having the staples of an effective compliance program—policies and procedures, training, and a confidential reporting system—is not enough. The DOJ expects policies, procedures, and trainings to be updated to reflect companies' risk profile and to educate employees based on past behavior.²¹ To have an effective compliance program, companies must "collect[], track[], analyze[], and use[] information from its reporting mechanisms," including investigations carried out in response to complaints received.²² Similarly, prosecutors must consider whether a compliance program is adequately resourced and appropriately empowered on an individual basis in light of a company's particular circumstances.²³

In addition to emphasizing the need for individual assessment of a compliance program, the 2020 revisions also highlight the importance of data resources to maintaining an effective compliance program. Through a new section entitled "Data Resources and Access," the Guidelines now highlight the need for companies to have access to data to monitor compliance and test "policies, controls, and transactions[.]"²⁴ Companies are expected to use this data to help evolve their compliance programs "to address existing and changing compliance risks."²⁵

18. *Id.* at 1.

19. *Id.* at 2.

20. *Id.* (internal quotation marks omitted) (citing *Justice Manual § 9-28.800*, *supra* note 6).

21. *See id.* at 2–6.

22. *Id.* at 7.

23. *See id.* at 11 ("[P]rosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company.").

24. *Id.* at 12.

25. *Id.* at 14.

Having learned through several public scandals spanning decades, the DOJ has gone from a reactive approach to compliance to one that is prescriptive. To receive credit, the DOJ expects companies to take steps to identify compliance concerns and remediate them in order to be effective. What is not clear is what the DOJ considers to be an effective compliance program and what concrete steps a company should take to ensure its compliance program is effective.

III. NEXT STEPS AND STAYING AHEAD OF DOJ EXPECTATIONS

Compliance officers today should not be thinking about checking the boxes and at least on paper meeting the requirements set out in the Evaluation of Corporate Compliance Program Guidelines. It is tempting to simply point to a policy or process that “satisfies” each element of a compliance program enumerated by the DOJ and call it a day. However, focusing on ethical decision making and proactive early detection of potential issues should be prioritized. Whether it is Wells Fargo²⁶ or General Motors,²⁷ the existence of a compliance program with the required elements is not sufficient to ward off significant scandals. With this in mind, there are two areas that can be better leveraged to avoid bad corporate behavior.

First, engaging the hearts and minds of employees and encouraging ethical decision making is key. Technology provides new and more effective ways to reach and communicate with employees. For example, apps can be placed on employees’ mobile devices and can be loaded with relevant policies and guidance on the go. Further, these apps can be used to automatically send relevant communications and alerts to employees at key times. Such as sending an alert when a sales employee arrives in China alerting them of the company’s gifts and hosting guidelines customized to the Chinese market. Providing information in a user-friendly format at a time when it is needed and relevant will foster positive behaviors. It is key to meet employees where and when it makes sense. Contrast this with simply providing an annual generic online training, which can be quickly forgotten. Ultimately, increasing awareness and changing behaviors must be a key goal of any successful compliance program.

Second, the changes to the Justice Manual, USSG, and Guidelines make clear that data plays an increasingly important role in the assessment

26. See INDEPENDENT DIRECTORS OF THE BOARD OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT (2017), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf> [<https://perma.cc/S5PU-2TJB>] (detailing root cause for opening of unauthorized accounts and selling of unwanted products by Wells Fargo employees, including the role of management).

27. See Press Release, U.S. Sec. & Exch. Comm’n, General Motors Charged With Accounting Control Failures (Jan. 18, 2017) (on file with author) (stating that General Motors agreed to pay \$1 million following allegations of deficient internal accounting controls after accountants did not evaluate the likelihood of a recall resulting from a defective ignition switch for over a year).

of an effective compliance program. Data is everywhere, and companies must make use of it. For example, companies can look at accounts payable data to observe trends and anomalies to identify unusual activity allowing for the early detection of unethical or fraudulent behavior. Similarly, employee travel and expense data can provide an interesting window into employee behavior. Further, many tools are already available on the market to assist companies overwhelmed in the face of so much data, including due diligence and trade compliance assistance. Companies should assess how artificial intelligence and data mining can be implemented to encourage a culture of compliance. Each company has its own unique set of data and unlocking that data will allow for the implementation of a more proactive and thus increasingly effective compliance program.

As compliance programs become more sophisticated, though, what is considered effective will remain subject to change. What is certain is that companies cannot remain stagnant in their approach to compliance and expect the DOJ to look favorably upon the program in the event of corporate wrongdoing. While the DOJ has provided a guide for the elements of a compliance program it considers important, companies can stay ahead of the curve and more importantly protect their reputations and bottom lines by enhancing their compliance programs so that they are dynamic and forward-looking. While a compliance program cannot prevent deliberate unethical or unlawful conduct by individual employees, exceeding the minimum DOJ requirements and implementing proactive technology and data driven solutions will result in greater employee awareness and correspondingly more ethical conduct.